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January 4, 2001

BY HAND DELIVERY

Ms. Magalie R. Salas, Secretary
Federal Communications Commission
Portals II, TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

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JAN -4 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

Re: In the Matter of
Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Littlefield, Arizona, et al.)
File No.: Docket No. 99-282; RM-9710

Dear Ms. Salas:

Transmitted herewith on behalf of Death Valley Broadcasters are an original and four (4) copies of its "Opposition to Application for Review" as directed to the Commission.

Should any additional information be required, please contact this office.

Very truly yours,



Henry E. Crawford
Counsel for
Death Valley Broadcasters

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Littlefield, Arizona, et al.)

Docket No. 99-282

RM-9710

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Death Valley Broadcasters ("Death Valley"), by counsel, pursuant to 47 CFR §1.115(d) respectfully submits its *Opposition to Application for Review* in response to the *Application for Review* ("Application") filed on December 20, 2000, by Mountain West Broadcasting ("Mountain West") in connection with the *Memorandum Opinion and Order*, DA 00-2483, Docket 99-282, released November 3, 2000 ("MO&O"). In support thereof, the following is stated:

I. INTRODUCTION

1. The Application is the latest attempt by Mountain West to rehabilitate the deficiencies of its original petition for rulemaking. At each stage of review in this proceeding, Mountain West has attempted to add to the record to show that Littlefield, Arizona is a community for allotment purposes. Even now, in its Application, Mountain West has attached new supplemental material. Nevertheless, Mountain West has only demonstrated an overall lack of diligence

and has fallen far short of the required showing. Consequently, its Application must be dismissed accordingly.*

II. ARGUMENT

2. In the NPRM, the Commission noted that Littlefield lacked the essential elements to be considered a community for allotment purposes. It therefore requested Mountain West to produce additional information in support of its allocation request. As stated in the NPRM:

We note that the 1998 Rand McNally Commercial Atlas and Marketing Guide attributes Littlefield with a post office, zip code (86432) and a population of 100 persons. However, those few attributes are not sufficient to establish community status. See Coker, Alabama, 43 RR 2d 190, 193 (1978). Petitioner did not provide documented evidence to identify the community attributes it associates with Littlefield or shown [sic] that they are intended to serve Littlefield as opposed to other areas. Therefore, petitioner and other interested parties filing comments on this proposal are requested to present the Commission with specific information regarding the attributes of Littlefield, Arizona, consistent with the guidelines set forth above. Failure to provide the specific information requested will result in a denial of the proposal.

NPRM, p. 4 (emphasis supplied).

3. Despite this clear statement by Commission, Mountain West made a paltry showing and its comments consisted of a handful of web pages, none of which showed Littlefield to be a community for allotment purposes.

Notwithstanding the oppositions filed by every other party to the proceeding,

* The submission of new factual material in the Application requires that it be dismissed in accordance with 47 CFR §1.115(c): "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."

Mountain West filed no reply comments and made no further showing whatsoever in the rulemaking.

4. Instead of making a proper showing in the rulemaking proceeding, Mountain West waited until its allotment request was denied in the initial report and order. Littlefield, Arizona, 15 FCC Rcd 10263 (Chief, Allocations Branch, 2000). Only then, when it had lost on the issue of whether Littlefield was a community for allotment purposes, did Mountain West attempt to buttress its showing in its petition for reconsideration of the report and order. Once again a sheaf of essentially irrelevant web pages were presented. On June 27, 2000, Mountain West filed a reply to Death Valley's opposition. Over a month later, on August 3, 2000, at a time when no other party could respond, Mountain West filed yet a further "supplement" to its reply pleading and, at that time, appended a new declaration and the statements of three purported residents.

5. It is long settled Commission law that a party cannot sit back and hope a decision will be in its favor, and when it is not, attempt to shore up its showing with additional submissions. Galesburg, Illinois and Ottumwa, Iowa, DA 00-2423, MM Docket No.: 97-130, released October 27, 2000 (Chief, Allocations Branch), ¶ 5, citing, Colorado Radio Corp. v. Federal Communications Commission, 118 F2d 24 (D.C. Cir. 1941). As noted in Galesburg, no Commission process could operate efficiently or expeditiously if procedures such as those adopted by Mountain West were permitted. At every point in the process, Mountain West held back its information until after it had either lost the decision or, as in the case of the August 3, 2000 supplemental reply, no other

party could respond. The MO&O was correct in refusing to accept Mountain West's gamesmanship.

6. This latter aspect is what distinguishes the instant case from that of Moncks Corner, 15 FCC Rcd 8973 (May 19, 2000). There, the Commission found that the first opportunity to respond to questions concerning the issue of whether Sampit, South Carolina was a community was at time for filing petitions for reconsideration. The community issue only came up in reply comments filed in connection with a Public Notice issued in response to a counterproposal filed in the underlying rulemaking. Moncks Corner, Kiawah Island, and Sampit, South Carolina, 15 FCC Rcd 8973 (Chief, Allocations Branch, 2000), ¶ 8. In the present case, Mountain West was put on notice as early as the NPRM that it would have to demonstrate that Littlefield qualifies as a community for allotment purposes. However, as we have seen, Mountain West did not heed this admonition, but continues to this day to attempt to fortify its showing.

7. Columbia, California, 7 FCC Rcd 6302 (Chief Policy and Rules Division, 1992) is wholly irrelevant. In Columbia the Commission explicitly stated that it was not relying to any extent on the late filed information. Columbia, California, at f. 12. Therefore, Columbia has no bearing on the present case.

8. Mountain West also argues that had the staff looked at the Yahoo.com web site, it would have found relevant information. Application, p. 3. However, this claim is of no merit. The Commission has long held that a party cannot rely on the Commission's staff to make its case, but must either take the initiative to present its case in full at the outset, or bear fully the risk that its

showing will be found inadequate. Carolyn S. Hagedorn, 11 FCC Rcd 1695 (1996) ¶¶ 12-13. In the present case, Mountain West has taken that risk, and clearly lost.

9. In the final analysis, regardless of when it was presented, none of the information supplied by Mountain West is sufficient to demonstrate that Littlefield is a community for allotment purposes. There are no substantial submissions by actual members of the alleged community. Not a single schoolteacher, fireman, postal worker or other local official submitted a statement. There is no objective or subjective showing that Littlefield has any sort of independent cultural or civic life. In the end, a bunch of web pages, without more, cannot constitute an entire community showing because such an approach lacks any input from the people who actual make up the community. This is particularly so in the instant case where those web pages essentially refer to businesses and entities with Beaver Dam in their name, and not Littlefield.

10. Mountain West's lack of diligence is further demonstrated by its failure to seek reconsideration of the grant of the KONY-FM one-step upgrade. As noted in the MO&O, that decision, having never been contested is now final and cannot be rescinded. No explanation is given by Mountain West for its failure to seek reconsideration of that grant. While Mountain West does suggest various scenarios as being "reasonable", it had a firm obligation to file a timely petition for reconsideration of the grant with the FM Branch. There is nothing reasonable about failing to do anything to protect its proposed allotment at the time of the grant of the KONY-FM upgrade or at the time of the release of the

instant rulemaking proceeding. Instead of taking action, Mountain West sat on the sidelines while the grant of the KONY-FM upgrade matured into a final action.

III. CONCLUSION

11. The remarkable thing about the continuous barrage of new information and documents submitted by Mountain West is that nothing submitted by Mountain West is sufficient to show Littlefield to be a community for allotment purposes. Reams of web pages and three declarations simply will not pass muster. Mountain West has at all times refused to do its homework or act with diligence in any respect in connection with the allocation. In the end, all this shows is that Littlefield is not a community for allotment purposes and cannot be made so by the spin tactics and gamesmanship of Mountain West.

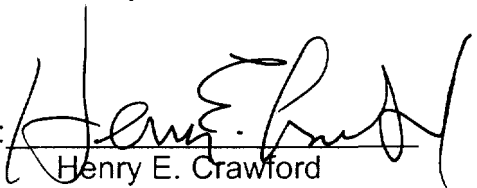
WHEREFORE, Death Valley Broadcasters respectfully requests that the Application for Review filed by Mountain West Broadcasting be denied.

January 4, 2001

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Respectfully Submitted,

Death Valley Broadcasters

By: 
Henry E. Crawford
Its Attorney

CERTIFICATE OF SERVICE

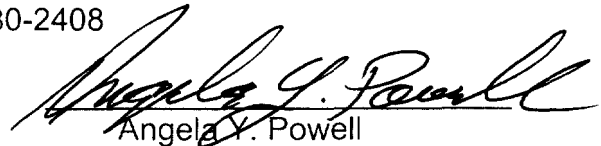
I, Angela Y. Powell, do hereby certify that copies of the foregoing
Opposition to Application for Review have been served by United States mail,
postage prepaid this 4th day of January, 2001 upon the following:

*John A. Karousos
Chief, Allocations Branch, Policy & Rules Division
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